had been the case. The question as to what rule of law should be applied to cases involving flood-waters has been very widely considered, the English courts going to the full extent of treating the flood-water as part of the stream, *Menzies* v. *Breadalbane,* 3 Bligh. N. S. 414; *Rex* v. *Trafford,* 1 Barn. & Ad. 814, and this rule has been followed to some extent by courts in the United States. *O'Connell* v. *East Tenn. etc. R. Co.,* 87 Ga. 246; *Chicago etc. R. Co.* v. *Emmert,* 53 Neb. 237; *Spelman* v. *Portage,* 41 Wis. 144. Many courts have held that flood-waters are surface-waters, but having arrived at this conclusion were in most cases no nearer a final decision because then the question arises as to what rule applies to such surface-waters, and this must necessarily be determined by the particular facts in each case. *Cairo & V. R. Co.* v. *Stevens,* 73 Ind. 283, 38 Am. Rep. 139; *McCormick* v. *Kansas City etc. R. Co.,* 57 Mo. 433; *Morris* v. *Council Bluffs,* 67 Iowa 343, 56 Am. Rep. 343. On the other side there are a greater number of cases holding flood-waters not surface-waters. *Crawford* v. *Rambo,* 44 Ohio St. 287; *Gillett* v. *Johnson,* 30 Conn. 180; *Macomber* v. *Godfrey,* 108 Mass. 219; *West* v. *Taylor,* 16 Oregon 165; *Uhl* v. *Ohio River R. R. Co.,* 56 W. Va. 494, 3 Am. & Eng. Ann. Cases 201; *Shane* v. *Kansas, etc. R. Co.,* 71 Mo. 238, 36 Am. Rep. 480. Probably the best rule is that followed by this case, where it is stated that flood-water should be treated as forming a class by itself apart from surface-waters and natural water courses in determining the rights and liabilities arising therefrom. This is sanctioned by the note in 25 L. R. A. 527, 530, and in FARNHAM, WATERS AND WATER RIGHTS, § 879. This of course does not mean that one hard and fast rule can be formulated in respect to rights concerning flood-waters, because such a rule could not work justice in every case. A different rule would be applicable in the case of flood-waters flowing in one general direction, than would be applied in the case of flood-waters which lay spread about upon the land until they percolate through the soil or evaporate.

WILLS—CONTRACT TO DEVISE—STATUTE OF FRAUDS—PART PERFORMANCE.—Husband and wife, in accordance with an oral agreement that they would execute mutual wills and that such wills should be irrevocable except under certain conditions, executed wills simultaneously by which each gave his or her real and personal property to the other. *Held,* that the execution of the wills was not such part performance as to take the oral agreement out of the operation of the Statute of Frauds. *In re Edwall's Estate* (Wash. 1913), 134 Pac. 1041.

The decided weight of authority is with the decision in this case, and it is difficult to see how any other conclusion could logically be reached. The making of the will cannot be relied upon as an act constituting part performance, for a will, being ambulatory, is subject to revocation by various acts of the testator. There has been no transfer of real estate, for the property devised in the will remains, until his death, in the hands of the testator and subject to his own control. *Gould* v. *Mansfield,* 103 Mass. 408. One case, however, and a recent one, has held that the oral agreement and the execution of the reciprocal wills constitute a single transaction and therefore that

such a contract cannot be said to rest in parol; that the wills, in equity, are not ambulatory, and may not be revoked by either party so long as the other party continues to perform the contract; and that where either party to such a contract commits a breach of same by subsequently executing another will devising his property contrary to the terms of the contract, the other party is entitled to specific performance. *Brown* v. *Webster,* 90 Neb. 591, 134 N. W. 185, 37 L. R. A. N. S. 1196.

WILLS—GIFTS PARTLY VOID.—Testator devised the residue of his estate to the town to use the income forever to care for testator's burial place, and the balance to support public schools. It was claimed that the whole gift was void because an uncertain part was to be devoted to a private purpose (care of a burial place) as to which a perpetual trust would be void. But the court found that $3 a year would care for the burial place, reviewed the conflicting decisions as to the validity of trusts to maintain tombs in perpetuity, and succeeded in avoiding a decision on the point by holding the charitable trust to support the public schools was separable from the rest, or if not the whole might be devoted to the support of the public schools, charged with a "moral obligation" to maintain testator's tomb. *Smart* v. *Town of Durham,* (N. H. 1913), 86 Atl. 821.

In another recent case $500 out of an estate of $30,000 was given to St. Mary's Catholic Parish of Sterling in trust to keep testator's burial lot forever in repair and use the rest of the income in support of the parish school, and it was held that the whole gift was valid in view of the trifling amount of the bequest compared with the rest of the estate. *Burke* v. *Burke* (Ill. 1913), 102 N. E. 293. In this case contestants relied on the prior decisions of the court that trusts for perpetual care of a burial lot are void: *Mason* v. *Bloomington Lib. Assn.,* 237 Ill. 442, 85 N. E. 1044, 15 Ann. Cas. 603; and that the valid provisions of the will must be rejected with the invalid where the will manifests a connected plan destroyed by the invalidity of a part, where the good cannot be separated from the bad, or where enforcement of a part only would result in injustice. *Barrett* v. *Barrett,* 255 Ill. 332, 99 N. E. 625. The general rule is that the invalidity of a part of a gift or trust does not destroy the rest if the good can be separated from the bad, unless the result thereby produced is a disposition that the testator probably would not have made if he had known that part of his plan could not have effect. *Landram* v. *Jordan,* 203 U. S. 56, 27 Sup. Ct. 17; *Niles* v. *Mason,* 126 Mich. 482, 85 N. W. 1100; *Johnson* v. *Johnson* (Ky. 1904), 79 W. 293.

WILLS—TESTAMENTARY CAPACITY — SUFFICIENCY OF EVIDENCE.—The testator suffered at times from attacks of insanity, but all the witnesses present when the will was made, including the subscribing witnesses, a physician, and a nurse, testified that at the time of making the will the testator was of sound and disposing mind. The only evidence tending to prove mental incapacity was that the frequency of the attacks of dementia was increasing, and that before and after the will was executed the testator made declarations of intention contrary to that expressed in the will. *Held,* that at the time of